

STATE OF WISCONSIN
Department of Industry, Labor & Human Relations

In the Matter of the PECFA Appeal of

Vern Dahl
Open Pantry Food Marts of WI
817 S. Main St.
Racine WI 53402

PECFA Claim #54911-4341-11
Hearing 994-49

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed January 4, 1994, under §101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on April 24, 1995, at Madison, Wisconsin.

The issues for determination are:

- A. Whether the department's decision not to reimburse the appellants for drilling and monitoring wells in a total amount of \$3,597 was reasonable.
- B. Whether the department's denial of additional costs in the amount of \$1,525 for geoprobe work was appropriate.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Vern Dahl
Open Pantry Food Marts of WI
817 S. Main St.
Racine WI 53402-
By: Vern Dahl

Department of Industry, Labor and Human Relations
201 East Washington Avenue
P.O. Box 7946
MADISON WI 53707-7946
By: Kristiane Randal
Assistant General Counsel
P.O. Box 7946
Madison WI 53707-7946

The administrative law judge issued a Proposed Decision dated August 14, 1995, and the parties were provided an opportunity to file objections. The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated October 20, 1995.

The matter now being ready for decision, I hereby issue the following

FINAL DECISION

The Proposed Decision dated August 14, 1995, is hereby adopted as the final decision of the department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel, P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel, 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed: **November** 27, 1995

Richard C. Wegner, Deputy Secretary
Department of Industry, Labor & Human Relations
P O Box 7946
Madison WI 53707-7946

cc: Parties in Interest

**STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS**

IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

Vern Dahl, d/b/a Open Pantry Food Marts of Wisconsin

Hearing Number: 94-49
Re: PECFA Claim # 54911-4341-11

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Patrick J. Osborne, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

STATE HEARING OFFICER:
David C. Wagner

DATED AND MAILED:

AUGUST 14, 1995

MAILED TO:

Appellant Agent or Attorney

Open Pantry Food Marts of WI
Attn: Vern Dahl
817 S. Main Street
Racine, WI 53402

**Department of Industry, Labor
and Human Relations**

Kristiane Randal
Assistant Legal Counsel
P.O. Box 7946
Madison, WI 53707-7946

On October 4, 1994, the Department of Industry, Labor and Human Relations issued an appealable order denying reimbursement in the amount of \$6091.74 to Open Pantry Food Marts of Wisconsin. A timely appeal from that denial was filed on October 10, 1994. A hearing pursuant to that appeal was held on April 24, 1995, at Madison, Wisconsin, before Administrative Law Judge David C. Wagner, acting as a State Hearing Officer.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Open Pantry Food Mart of Wisconsin operates a convenience store and gasoline retail outlet in Appleton, Wisconsin. During July and August of 1993, remediation work under the PECFA program was undertaken utilizing Advent Environmental Services, as the general contractor, and as such, became a party of interest, and also acted as the applicant's agent in this proceedings (hereinafter both parties shall be referred to as "applicant")

2. The applicants made a PECFA claim for remediation costs in a total amount of \$25,908.75. \$6091.74 was declared not eligible for reimbursement. The applicants received a total PECFA payment of \$16,451.16.

3. In completing the PECFA application, the applicants submitted initial bids from three separate contractors. These bids were for six borings to be drilled to a depth of 10 feet, and to plug and abandon those borings. The applicants accepted the bid of Briohn Environmental Contractors to perform that work.

4. On July 23, 1995, the above-noted six borings were completed pursuant to the bid. However, during the drilling process water seeped into the original bore holes that was not expected when the work was commenced. At that point it was then decided to install monitoring wells. Because the bore holes had already been completed the decision was made to utilize the same contractor to install the monitoring wells rather than stop work and rebid the enlarged scope of the work. In addition, it was also decided to do off-site borings with a geoprobe. Without soliciting new bids the applicants had the same contractor perform this work in August of 1993.

5. The applicant appeals denial of the following elements of the initial claim:

- a. \$117.74 in mileage costs.
- b. \$3,587.00 for costs associated with drilling and the installation of three ground water monitoring wells.
- c. \$1,525.00 for geoprobe work.

6. It was stipulated at the hearing that the department will reimburse the applicants for the \$117.74 in additional mileage costs.

7. Of the \$3,587.00 declared ineligible by the department for well drilling expenses, \$2,497.00 of that amount was declared ineligible because the applicants have not satisfied the department that it utilized the lowest bidder in the performance of the work. However, although the three bids which were sent to the department for review were set forth in such a fashion as to make it difficult to compare the bids against each other, after a number of mathematical computations were performed, it was demonstrated that Briohn Environmental Contractors was the lowest bidder for the original scope of the work. Although the bidders did not set forth each phase of the project in a parallel fashion, the total costs for the bids was ascertainable and demonstrated that the applicants' selection was the low bidder for the original scope of that project. Therefore, reimbursement of those costs is justified within the meaning of the PECFA program. The remaining amount, \$1,090.00, related to the installation of the ground water monitoring wells, and will be considered in the paragraph below.

8. The installation of the groundwater monitoring wells in the amount of \$1090.00 and \$1,525.00 for geoprobe drilling was work that was performed for which the applicants had not received a bid. The applicants argued that relative to the ground water monitoring wells it was more cost effective to install the ground water monitoring wells at the time of the original borings was completed rather than plug those borings and redrill after the submission of new bids. However, that work was not envisioned in the original bid process, nor was there any contingency planning to take into account these additional costs. The same is true for the additional off-site borings performed by Briohn Environmental Contractors. Although it might have been logical to conclude that using the same contractor, one that was already on site and mobilized to perform the additional work, was the most cost effective solution, without any additional comparative bids, it is not possible to draw that conclusion with any certainty. In addition, the regulations require the bidding of these specific services. Therefore, the department's determination that these costs were not reimbursable was reasonable under the circumstances.

PROPOSED CONCLUSIONS OF LAW

1. The applicants are owners or agents of a property covered by the remedial provisions of section 101.143 of the Wisconsin statutes.
2. The sum of \$2,497.00 for drilling costs and bore hold abandonment shall be reimbursed to the applicants within the meaning of section 101.143(4) of the Wisconsin statutes, and chapter ILHR 47.30 (2) (a) 15 of the Wisconsin Administrative Code.
3. The sum of \$1,090.00 for the installation of three ground water monitoring wells was properly deleted from the amount reimbursable to the applicant, within the meaning of ILHR 47.30(2) (a)15 of the Wisconsin Administrative Code.
4. The sum of \$1,525.00 for geoprobe work was properly deleted from the amount reimbursed to the applicants, within the meaning of section ILHR 47.30(2) (a)15 of the Wisconsin Administrative Code.
5. The amount of \$117.74 in mileage costs shall be reimbursed to the applicant, within the meaning of section 101.143 of the Wisconsin statutes and chapter ILHR 47.30 (2) (a) 15 of the Wisconsin Administrative Code.

PROPOSED DECISION

The department's decision denying reimbursement to the applicant is modified to conform to the above findings, and-as so modified is affirmed. Accordingly, the applicant is entitled to an additional reimbursement of \$2,497.00, and the balance of the reimbursement demanded by the applicant is denied.

APPEAL TRIBUNAL

David C. Wagner
Administrative Law Judge

P94-49/mm